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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GREGORY LEE COOPER, Defendant and Appellant.	2d Crim. No. B204826 (Super. Ct. No. 2005021822) (Ventura County)

Gregory Lee Cooper appeals from his conviction after jury trial of aggravated mayhem and arson causing great bodily injury. (Pen. Code, §§ 205; 451, subd. (a).)[1] The court sentenced him to state prison for life with the possibility of parole for aggravated mayhem and stayed his sentence for arson pursuant to section 654. Appellant claims that evidentiary and instructional errors, juror misconduct, and ineffective assistance of counsel deprived him of a fair trial. He also challenges the sufficiency of the evidence to support the finding of aggravated mayhem. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case in Chief

Jim Weblemoe and appellant's father, Phil Cooper, owned 120 acres of rural property on Largo Lane in Fillmore. The property was split into two parcels,

[1] All statutory references are to the Penal Code unless otherwise stated.

including a 70-acre ranch (the Cooper property) where appellant lived with his family. In 2000, Weblemoe sold the other parcel to Andrew Chavez, who owned a farming business and planned to grow cilantro on the property. He and Weblemoe entered into a several-year escrow, during which Chavez used the property and made monthly payments. Chavez obtained an access easement across Cooper's property and the right to use water from a well on the Cooper property.

Chavez visited his property frequently, often daily, and began preparing the land for farming. He bought a bulldozer and hired a worker to clear the land. He also hired a company to install a water irrigation line for his property, to carry water from the well on the Cooper property. At some point, Chavez began to notice that the easement road was sometimes blocked with appellant's equipment or debris. He discussed these problems with appellant and Weblemoe. When Chavez found that his irrigation line had been broken and dug out by a backhoe, he discussed the problem with appellant's father.

On May 20, 2004, appellant used his truck to push Chavez's truck while he was driving on the property. Appellant was angry and said things like, "'And don't mess with me.'" This scared Chavez and he reported the incident to the Ventura County Sheriff's Department. Chavez declined to file a report or obtain a restraining order, but he started to document further incidents. On one occasion, water from the well on the Cooper property flooded Chavez's property. When Chavez asked appellant why that had happened, he did not provide an answer. Around the same time, Chavez saw spray painting that read, "'Got water?'" on the outside of the water well. At other times, Chavez found that debris had been dumped onto his property.

On June 27, 2005, Lawrence Klekas, a farm equipment mechanic, was going to Chavez's property when he met appellant near the easement road. Appellant spoke with Klekas for approximately 45 minutes. He told Klekas that Chavez "was the one causing all his problems," that he "didn't like" Chavez, and that Chavez "was trying to screw him out of his property."

On June 29, 2005, Chavez went to work on his property in the early afternoon, and found debris blocking the entrance. After removing the debris with a

bulldozer, he noticed that someone had moved his trailer, broken its windows, and sprayed graffiti inside it. He also found broken windows on a truck. Chavez then worked on his property for several hours.

At approximately 5:00 p.m., Chavez decided to leave the property. He made a telephone call and entered his truck to go home. (Chavez's cellular phone records reflect that he made a call at 5:32 p.m.) As Chavez approached the barn, he saw some equipment on the easement road blocking his exit route. He also saw appellant standing nearby, watering the ground.[2]

Chavez stopped his truck. Appellant approached and they spoke briefly through Chavez's open driver's door window. After they discussed Chavez's work on the property and the irrigation line, appellant said, "'Hey, I'm tired of you and my father always fucking with me.'" Chavez responded, "'What do you mean, Greg? I just talked to your father just one time.'"

Appellant, who was then a couple of feet from the driver's side of Chavez's truck, held a spray can.[3] He aimed it into the air, away from the truck, sprayed, and used a lighter to ignite the spray. He then approached the truck window, aimed the spray at Chavez, and tried to ignite it with the lighter. It did not ignite. Chavez pushed appellant's hand away and started to drive forward, slowly, around the bulldozers on the easement. As he drove, appellant saw Mrs. Cooper walking from the house, saying, "Don't do that. Don't do that."

Around the time that Chavez passed the bulldozers, appellant jumped on the truck and appeared at the driver's window. Chavez recalled that appellant ran after

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[2] During the defense case, one witness testified that the section of the easement road that passes behind the barn is very narrow.

[3] On the date of the incident, Chavez told a deputy that appellant had grabbed a spray can from a bulldozer. On subsequent occasions, he said that appellant took the can from a truck; that he did not see appellant grab the can from anywhere; and that appellant pulled the spray can from under his shirt. At trial, he testified that he did not see the type of can appellant was spraying and did not know where it came from.

him while holding onto the door of his truck, and "jumped and . . . [threw] himself inside the truck," with "his elbows inside the window." Chavez thought that appellant had held onto the moving truck for "a good 20 feet, 30 feet." Chavez heard the lighter click four times while appellant directed spray into the truck and tried to ignite it. The spray then burst into flames inside the truck.

Chavez drove a short distance, stopped, left the truck, and removed his burning shirt. He then realized that his skin was burning, and patted the flames down to extinguish the fire. He returned to his truck, and quickly drove away from the Cooper property. Before 5:52 p.m., he called 911 and the operator instructed him to wait there for an ambulance. (The log entry for the 911 call was created at 5:52 p.m.) Fearing that appellant would pursue him, Chavez told the operator that he would instead meet the ambulance at Willard Road and the 126 highway.

John Wilson, a paramedic, met Chavez at Willard Road and the 126 highway. Chavez's truck was smoking and he was agitated. Chavez said, "'I don't understand why he did this. Isn't this against the law?'" Wilson noticed burns on Chavez's hands, stomach, and face. Within a short time, paramedic Richard Hawkins and his partner arrived in an ambulance. The skin from Chavez's arms was "hanging down on his forearms and by his hand." Hawkins' partner gave Chavez morphine because he was in considerable pain. After the ambulance took Chavez to a local medical center, he was transported to the Grossman Burn Center and remained there for about three weeks. His severe, deep second or third degree burns required two surgeries with skin grafting.

At approximately 6:30 p.m. on June 29, Ventura County Sheriff's Department bomb and arson detail deputies took "DNA" samples from Chavez's truck. The samples did not connect appellant to the truck. The deputies also searched the dirt road adjacent to the Cooper residence but failed to locate any flammable liquid substance.

Between 7:00 and 8:00 p.m., Anthony Biter, a deputy sheriff, approached appellant's residence with two other deputies. Appellant's wife was watering the driveway, but appellant was not home. Appellant' s wife called him, and he drove home

immediately. The hairs on the back of his right hand were singed. Biter arrested appellant and took him to the Fillmore sheriff's station.

At the station, a sergeant placed paper bags on appellant's hands while waiting for a technician to photograph them and collect trace evidence. While the sergeant left him alone briefly, appellant tore the bags and removed them. The sergeant placed another set of bags on his hands and told him not to remove them. When the sergeant left the room briefly, appellant tore the bags and removed them.

Kristin Rogahn, a forensic scientist, conducted an ignitable liquid analysis. She found no ignitable liquid residue on the items recovered from the cab of Chavez's truck. However, Rogahn would not expect to find residue if a "clean-burning" fuel had been sprayed into a truck cab and ignited with an open flame.

Alan Campbell, a Ventura County Fire Department investigation specialist, examined Chavez's truck and conducted experiments with seven different aerosol spray products. Videotapes of the experiments showed several attempts to ignite spray with an open flame from a lighter beneath a vehicle headliner.

James Allen, a retired California State Fire Marshall Arson Bomb Division supervising investigator, reviewed the evidence from the fire. He concluded that the fire involved "short duration, open-flame contact with the victim and the interior of the vehicle." Based upon Chavez's burn injuries, which were more severe on his left hand and arm than his right, Allen concluded that the fire traveled from left to right and across Chavez. The fire patterns on the fabric steering wheel cover and those on Chavez's hands and arms indicated that his hands were on or near the steering wheel when the flames reached him. The truck's plastic headliner melted, dripped, and caused Chavez further injuries. The headliner did not ignite, which indicated that the fire had a short duration.

Allen also concluded that the flames entered the truck cab through, or adjacent to, the truck's left front door, or the window of that door. The fire patterns were consistent with a flammable liquid that was sprayed from an aerosol can through the left side of the truck before it was ignited with a lighter. The fire patterns excluded the possibility that Chavez had started the fire himself with an open flame, such as a lighter,

while sitting in the driver's seat. The fire patterns also excluded the possibility that Chavez entered the truck with flammable liquid on his clothing, with the clothing igniting later from an open flame.

Allen explained that spray from an aerosol can would not ignite without a correct ratio of fuel to air. Because the area immediately adjacent to the spray source has excessive air relative to fuel, a person can ignite spray from an aerosol can without burning himself in the open flame if the can is held in the area between the nozzle and the flammable range. The radiant heat from the combustion could singe the hair on the hands of the person who ignited the spray. The singeing of the hair on appellant's fingers and the minimal thermal exposure in the photographs of his hands were consistent with the radiant heat associated with ignited vapors. Chavez's description of the incident was consistent with Allen's opinion regarding the cause and origin of the fire.

Allen further testified that fire investigators classify fire causes into three categories: a naturally caused fire; an accidental fire; and a fire that is "incendiary or purposely started when the individual knows that starting it is incorrect." Based upon the evidence in the instant case, Allen concluded that an open flame was directed at Chavez rather than the truck, and that the fire was an "incendiary fire purposely started with the intent to injure or destroy." Allen opined that in this case the fire was motivated by revenge.

Defense

Appellant's 13-year-old son, Gregory, testified that there were often several bulldozers parked near the easement road, with room to go around them. In addition, several cable spools were normally stored near the easement road. Gregory also testified that the family watered the driveway regularly to reduce dust.

Appellant had a dirt bike motorcycle and a street bike motorcycle. He and his whole family rode motorcycles. On June 29, 2005, appellant used a welder while he and Gregory worked on a motorcycle. Appellant did not wear welding gloves while using the welder that day.

Dale Strickland, a welding supervisor, testified that welders use gloves for safety reasons. Anyone who does not wear gloves while welding can singe his hands.

In 2005, appellant's friend, Howard Dryer, was a truck dispatcher who sometimes dumped green debris on appellant's property. Dryer met appellant through his work in 2003 or 2004 and saw him several times a week. Dryer also helped appellant find jobs and gave him cases of beer. On June 29, 2005, Dryer finished working at "about 5 p.m.," and drove to appellant's ranch. Dryer was not sure of the time that he arrived there, but he thought that it was "pretty close to 5:30 [p.m.] and "want[ed] to say approximately 5:30 or 5:40 [p.m.]." Approximately 10 minutes later, Dryer and appellant went to a potential job site in a rural area near Boulder Creek, where there had been a slide. They stayed in that area for about 20 to 30 minutes and found that the slide had already been cleared. They next went to the Unica Market in Fillmore. Dryer received some phone calls, between 6:33 and 7:07 p.m., before they returned to the Cooper property.

Appellant called Frank Hsu, Ph.D., a fire scientist, as an expert witness. Hsu opined that Chavez's hands could not have been on the steering wheel during the fire if the fire came from the left, because Chavez lacked the kind of injuries Hsu would expect to see in that case, such as burns on part of his inner right arm. Hsu concluded that the fire started in the left front corner of the truck, near the windshield.

Although Hsu had previously concluded that the evidence was consistent with a flash fire or an aerosol spray can fire, he modified his conclusion after he viewed the prosecution's fire experiment video. Hsu testified that if the spray source were outside the truck, as the video depicted, he could not explain the headliner damage. If the spray had come from inside the truck, Hsu opined that the perpetrator would also have had injuries.

Other defense experts provided testimony concerning appellant's physical limitations. For example, a chiropractor examined appellant in December 2006 and found that he had a 10 to 14 percent disability in his left hip, and that he had a large rod

in his left femur. The chiropractor opined that it would be very difficult for appellant to run 150 to 300 feet and jump onto a moving vehicle.

Roderick Stroud, Ph.D., a biomedical engineer, reviewed records concerning appellant's left hip joint condition. He opined that appellant could not have jumped onto the truck, and held and operated an aerosol can in one hand and a lighter in the other hand, as described by Chavez, even if the truck were standing still.

Appellant also presented testimony from an accident reconstruction expert, Sinclair Buckstaff. Buckstaff opined that it would be extremely difficult for someone of appellant's stature to jump onto the running board of a moving truck while holding a lighter in one hand and holding and spraying a can into the truck's interior with his other hand.

Dr. Joel Teplinsky, a plastic surgeon with approximately 20 years of experience at the Grossman Burn Center, reviewed photographs of appellant's hands and face. Teplinsky noted that some of the hairs on appellant's hands were singed. The photographs also showed a red mark on one hand. Teplinsky testified that the red mark appeared to be an avulsion injury (i.e., an area with skin torn away) rather than a thermal or burn injury. Teplinsky observed no injuries in the photograph of appellant's face.

Prosecution Rebuttal

Michael Fontes, a manager of Adobe Company, testified that Dryer worked for Adobe for many years. Dryer was a truck dispatcher. Because Adobe often had difficulty determining Dryer's location, it activated a "GPS" on his company cell phone. Fontes did not believe that Dryer had been honest with Adobe.

DISCUSSION

Evidentiary Claims

Appellant argues that the trial court committed reversible error by allowing an expert witness to speculate about the motive for the crimes and by admitting certain evidence regarding vandalism on Chavez's property. We disagree.

At trial, Allen, the prosecution fire expert, opined that the fire was "purposely started with the intent to injure or destroy," that it "was directed at the victim,

not at his vehicle," and that it was an incendiary fire purposefully set for revenge. Appellant objected to Allen's testimony regarding motivation on the ground that it was more prejudicial than probative, and cited Evidence Code section 352. On appeal, appellant argues that the admission of the evidence was erroneous because it violated section 29, invaded the province of the jury, and "lacked foundation and violated his Sixth Amendment right to confront witnesses against him because Allen based his opinion on what he read in the 'literature' and in newspaper reports." Section 29 has no application to this case because Allen did not testify about appellant's "mental illness, mental disorder, or mental defect." We are not persuaded by appellant's claim that Allen effectively did so, or the related claim that Allen's testimony usurped the jury's function of determining whether appellant had the intent to commit the charged crimes.

An expert may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (Evid. Code, § 801.) Although the direction, nature and characteristics of the fire in this case are sufficiently beyond common experience and within Allen's expertise, his opinion that the fire was motivated by revenge presents a closer question. Appellant also claims that the admission of Allen's opinion regarding motivation violated his Sixth Amendment right to confront witnesses. Even if that claim were true, and the error were subject to the more stringent standard of prejudice under *Chapman v. California* (1967) 386 U.S. 18, it would not be prejudicial. Under *Chapman*, an error is prejudicial unless the respondent shows it is harmless beyond a reasonable doubt. (*Id*. at p. 24.)

Allen's opinion concerned the motivation of the fire's perpetrator, and did not identify appellant as the perpetrator. The prosecutor referred to Allen's motive opinion just once and rather briefly during closing argument. Further, the court instructed the jury that it was "not required to accept the [experts' opinions] as true or correct," and that the "meaning and importance of any opinion [were] for [the jury] to decide." (CALCRIM NO. 332.)

Moreover, the jury heard overwhelming evidence of appellant's intent, independent of Allen's opinion. For example, he attacked Chavez from close range; he

persistently and repeatedly tried to ignite the spray while aiming it at Chavez; he used his truck in an aggressive manner to try to push Chavez's truck on a prior occasion; just a few days before the fire, appellant told Klekas that he thought Chavez was trying to screw him out of his property; just before starting the fire, appellant told Chavez that he was tired of Chavez and appellant's father "always fucking" with him. The admission of Allen's opinion regarding motivation, if erroneous, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Appellant also challenges the court's admission of Chavez's testimony concerning several acts of vandalism that were not connected to appellant by direct evidence. This includes the evidence of the broken irrigation line, the graffiti on the water well, the damage to the equipment on appellant's property, and the debris he found there. When appellant objected to that evidence below, the prosecution conceded that some of the vandalism could not be connected to appellant by direct evidence, but argued that it was relevant to motive. The court then ruled that it was admissible.

The court properly admitted the challenged vandalism evidence. Direct evidence established that Chavez had complained to appellant's father about vandalism on the property; that appellant told Klekas that Chavez was "screwing" him out of the property; and that shortly before spraying Chavez with flammable fluid, appellant said that he was tired of his father and Chavez "always fucking "with him. The prosecution theory was that appellant was motivated to attack Chavez at least partly because he thought Chavez had reported the vandalism to his father. The trial court properly admitted the vandalism evidence. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1073, 1120-1121, [where the defendant was angry that a sabotage victim had reported him to the police for sabotaging his vehicle, and the sabotage victim was later murdered, evidence of the sabotage was relevant to motive, even without direct evidence connecting it to the defendant].)

Flight Instruction

Appellant claims that the court committed prejudicial error by instructing the jury with a flight instruction, where the evidence did not demonstrate circumstances

suggesting that appellant's movement "was motivated by a consciousness of guilt" (*People v. Ray* 1996) 13 Cal.4th 313, 345) or a "purpose to avoid being observed or arrested" (*People v. Crandell* (1988) 46 Cal.3d 833, 869, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 [applying *Watson* standard to erroneous instruction on permissible inferences from trial evidence]). We disagree.

The trial court instructed the jury as follows, with the standard flight instruction, CALCRIM No. 372: "If the defendant fled or tried to flee immediately after the crime was committed[,] that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

When there is evidence of a defendant's flight, such evidence may be considered in deciding guilt or innocence and a flight instruction must be given sua sponte, pursuant to section 1127c. (*People v. Williams* (1997) 55 Cal.App.4th 648, 651; *People v. Mendoza* (2000) 24 Cal.4th 130, 179.) Here appellant claims that because he returned to his home while sheriff deputies were there, the evidence does not suggest that his movement was motivated by a consciousness of guilt or a purpose to avoid being observed or arrested. We disagree. The evidence supports the inference that appellant left immediately after the crime because he recognized his guilt, and wished to avoid being observed or arrested before he had an opportunity to try to establish his alibi. It also supports the inference that appellant was ready to face arrest after he had that opportunity.

Further, the flight instruction informed the jury that it should decide not only whether appellant had fled, but also "the meaning and importance of that conduct." Moreover, the trial court told the jury: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." (CALCRIM No. 200.)

In evaluating a flight instruction very similar to that given below, our Supreme Court stated: "The cautionary nature of the instruction[] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citation.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) In this case, appellant's counsel argued to jurors that because appellant returned to his ranch when the sheriff deputies were there, he did not flee: "If it were a matter of actually fleeing, I submit a person would not have returned."

Any claimed error in giving the flight instruction could not have been prejudicial in this case. (See *People v. Silva* (1988) 45 Cal.3d 604, 628.) There was strong evidence linking appellant to the crimes that occurred on his property in a rural location. Chavez knew appellant and identified him as his assailant immediately and consistently. Chavez's burns and other physical evidence were consistent with his description of the crimes. Moreover, after his arrest, appellant twice tore paper bags from his hands before a crime lab technician could photograph and collect evidence. Therefore, even without the flight evidence and instruction, any reasonable juror could infer that appellant displayed a consciousness of guilt.

Jury Misconduct

We also reject appellant's contention that jury misconduct deprived him of his constitutional right to a trial by jury. Appellant claims that the jury improperly considered information outside the record and that at least one juror was notably inattentive during trial.

According to his declaration, Juror 8 did not believe that the prosecution had proved appellant guilty beyond a reasonable doubt; he "attempted to engage his fellow jurors in dialogue and to examine the trial evidence"; and "most of the jurors said they had made their minds up and did not want to review any of the evidence." During the deliberation period, Juror 8 measured the driver's door window of a 2001 Dodge pickup to determine if appellant could have held onto Chavez's pickup as Chavez had described. By doing so, Juror 8 "determined that it would have been impossible for

[appellant] to fit his arms and hands inside the driver's door window of the moving pickup while holding a lighter and an aerosol can, and ignite the aerosol as was asserted."

When Juror 8 shared his findings with other jurors, they were not receptive. One juror "offered his opinion that [appellant] did not jump onto Chavez'[s] truck, but probably ran alongside the moving pickup and ignited the spraying aerosol can. One or two other jurors agreed with this alternative explanation. Another juror said, 'So what, the point is [appellant] burned Chavez.' And at least one other juror agreed with that view." "As the deliberation period neared its end, [Juror 8] became exasperated and abandoned [his] efforts in insisting [that] fellow jurors . . . examine each piece of evidence. [He] decided to vote guilty although [he] was uncomfortable with [his] decision to do so."

On the last day of trial, according to the declaration of attorney Hans Gillinger, one juror was reading a book while appellant's counsel was questioning a witness, and only three or four jurors were paying attention. During a break, Gillinger overheard the juror who was reading the book tell another juror that she was "reading one of her textbooks to study for an upcoming test."[4]

A criminal defendant has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *People v. Nesler* (1997) 16 Cal.4th 561, 578.) The defendant has the initial burden to prove jury misconduct. (*In re Carpenter* (1995) 9 Cal.4th 634, 657.) If the defendant establishes misconduct, a rebuttable presumption of prejudice is raised. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) "'A jury's verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters' [Citation.]. A juror commits misconduct if the juror conducts an independent investigation of the facts [citation], brings outside evidence into the jury room [citation], injects the juror's own expertise into the

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[4] Gillinger observed the trial while he and other attorneys represented appellant in *Chavez v. Cooper*, Ventura County Superior Court No. CIV 239950, Chavez's civil action against appellant concerning the burning incident.

deliberations [citation], or engages in an experiment that produces new evidence [citation]." (*People Wilson* (2008) 44 Cal.4th 758, 829.)

Although Juror 8's experiment constituted misconduct, it was not prejudicial. The other jurors were not receptive when he discussed his experiment with them. Under these circumstances, the presumption of prejudice was rebutted and "there is no inherent and substantial likelihood that the extraneous information influenced the other jurors or resulted in any juror's actual bias in rendering the . . . verdict. [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 193.)

Appellant further argues that the jury committed misconduct after learning of Juror 8's experiment because they then "speculated" about different ways in which appellant could have committed the crimes without jumping onto the truck. For example, appellant could have run alongside the truck while igniting the spray. Respondent argues that such comments are inadmissible under Evidence Code section 1150 because they are verbal reflections of the jurors' subjective reasoning processes. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1261; *People v. Lewis* (2001) 26 Cal.4th 334, 389.) We agree.

Appellant also stresses that one juror suggested that it did not matter what the evidence was, and that Juror 8's "report of his impermissible experiment led other jurors to ignore the record." The record belies this claim. During deliberations, the jury asked questions, and asked to hear the testimony of several witnesses, including the prosecution and defense fire experts, and appellant's alibi witness. It also requested an index of exhibits and clarification concerning the cellular telephone record exhibits.

Nor do we find that the alleged act of juror inattentiveness constituted misconduct. Although the incident reportedly occurred in open court, it escaped observation by the court, the prosecutor, and appellant's two criminal counsel. Appellant's civil attorney's delayed disclosure of this alleged misconduct undercuts the credibility of the allegation, especially where his declaration describes his communication with criminal trial counsel regarding other issues. Given these facts, the court reasonably rejected this contention of juror misconduct. (*People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1096-1097.)

Sufficiency of the Evidence to Support Aggravated Mayhem Conviction

Appellant contends that there is not sufficient evidence to support his conviction of aggravated mayhem. We disagree.

In reviewing an insufficient evidence claim, we consider the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) We presume the existence of every fact supporting the judgment that the trier of fact reasonably could have deduced from the evidence, and a judgment will be reversed only if there is no substantial evidence to support the conviction under any hypothesis. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

The aggravated mayhem statute, section 205, provides in relevant part as follows: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill."

Aggravated mayhem is a specific intent crime that requires proof that the defendant intended to cause the victim disfigurement or permanent disability. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 833.) Specific intent to maim "may be inferred from the circumstances attending an act, the manner in which it is done, and the means used, among other factors. [Citation.]" (*People v. Lee* (1990) 220 Cal.App.3d 320, 324-325.) Evidence that shows no more than an indiscriminate attack on or an outburst of violence against the victim does not support an aggravated mayhem conviction.

Appellant argues that absent "the improperly admitted Allen testimony and vandalism evidence, there is no basis on which a reasonable jury could have found that [appellant] entertained specific intent to disfigure Chavez." We disagree. Chavez's testimony alone established that when he tried to leave his property, appellant's

bulldozers were on the easement road, his exit path, and that appellant stood nearby, approached him, used an aerosol spray can and a lighter to ignite a flammable spray, then ran after Chavez's truck, directed that spray at Chavez with the aerosol can, and ignited it with a lighter from close range. Based on this evidence, the jury could reasonably infer that appellant had the specific intent to disfigure Chavez. We are not persuaded by appellant's suggestion that this was "no more than an indiscriminate attack on or an outburst of violence against the victim." Substantial evidence supports appellant's aggravated mayhem conviction.

Ineffective Assistance of Counsel

Appellant contends that his primary trial counsel's inadequate preparation deprived him of the effective assistance of counsel. We disagree.

"The burden of proving ineffective assistance of counsel is on the defendant. [Citation.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) In determining whether counsel was deficient, we measure counsel's performance "against the standard of a reasonably competent attorney . . . ." (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) "A defendant must prove prejudice that is a '"demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, at p. 694.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

Appellant lists many claimed deficiencies of his lead trial counsel, including poor selection and preparation of a defense expert; improperly handling the

prosecution's impeachment of defense alibi witness Dryer; failing "to listen to a key audiotape in the discovery"; and failing to object when "a reasonably prudent criminal defense lawyer should have objected." Appellant has failed to establish that but for counsel's unprofessional errors, the result of the proceeding would have been different.

To illustrate the absence of prejudice with respect to this issue, by way of example, we address the error that appellant describes as "especially egregious," counsel's failure to read the transcript of an "extremely important" prosecution interview with Cheryl Miller, the sister of Chavez's former girlfriend, Angela Gregory, and to use information from Miller "to develop and present to the jury a markedly different picture" of Chavez.

Appellant's new trial motion explains that Angela had advised a defense investigator that Chavez "had long plotted" to put appellant in jail by inciting him to violence and that Angela believed that Chavez "burned himself either when he attempted to start his D-8 Caterpillar with a gas-soaked rag, or as a result of an explosion in a meth lab that she believes he operated somewhere in the area." Miller (Angela's sister) told a prosecution investigator that Angela was "very scared" of Chavez, that he "was scared to death" that Angela would testify, and that this was why Angela had "said that none of that is true."

The prosecution subsequently interviewed Angela and she recanted the statements that she had given the defense. When Angela later appeared for a deposition in the *Chavez v. Cooper* civil case, she was "noticeably distraught, nervous, or high on drugs," with her hands shaking. In a declaration, appellant's lead trial counsel admitted that he did not notice or review the tape, or the transcript, of the Miller interview although they were in the discovery material that he received from the prosecution. Appellant has not established that the trial result would have been different absent counsel's failure to review the Miller interview transcript, even combined with the other alleged incidents of incompetency.

As we have already explained, the evidence against appellant is overwhelming. His alibi defense consisted of testimony from Dryer, his friend who was

not particularly sure about what time he arrived at appellant's ranch, but estimated it was about 5:30 or 5:40 p.m., and who accompanied appellant to a remote rural location where nobody saw them. Even apart from the Fontes testimony attacking Dryer's poor reputation for honesty, the alibi defense was not compelling. Assuming that a defense interview would have yielded admissible evidence to tarnish Chavez's image, without offending the jury, such evidence would not have diluted the devastating evidence of appellant's repeated attempts to destroy or conceal potentially incriminating evidence by tearing bags from his hands before the sheriff technician could photograph or take samples from them.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Allan L. Steele, Judge
Superior Court County of Ventura

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